

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23

**UNITED STATES DISTRICT COURT**  
**DISTRICT OF NEVADA**

Case No.: 3:18-cv-00527-LRH-WGC

**Order**

Re: ECF No. 110

HP TUNERS, LLC.,

Plaintiff

v.

KENNETH CANNATA.,

Defendant

Before the court is Plaintiff HP Tuners, LLC (“HPT”) Motion for Sanctions against Defendant Kenneth Cannata (“Cannata”). (ECF No. 110). Cannata filed a Response. (ECF No. 115). HPT filed a Reply. (ECF No. 117).

HPT’s Motion for Sanctions is brought in part under Federal Rule 37(c)(2). (ECF No. 110, 13-14). Federal Rule 37 (c)(2) states, “If a party fails to admit what is requested under Rule 36 and if the requesting party later proves a document to be genuine or the matter true, the requesting party may move that the party who failed to admit pay the reasonable expenses, including attorney’s fees, incurred in making that proof.” Fed. R. Civ. P. 37(c)(2).

It appears to the court that HPT’s Motion for Sanctions on this basis is premature because Federal Rule 37(c)(2) motions are customarily brought after trial. The advisory committee notes to the 1970 amendments to Rule 37 explain, “Even though Rule 37(c) does not specify the time when a motion for fees must be filed, it is intended to provide *posttrial relief* in the form of a requirement that the party improperly refusing the admission pay the expense of the other side in making the necessary proof *at trial*.” *Joseph v. Fratar*, 197 F.R.D. 20 (D. Mass. 2000), citing Fed. R. Civ. P. 37(c). (emphasis added). *See also* 8A CHARLES ALAN WRIGHT, ARTHUR R.

1 MILLER & RICHARD L. MARCUS, FEDERAL PRACTICE AND PROCEDURE § 2290 at  
2 708 n. 5 (1994) (indicating that a Rule 37(c) motion comes “after trial”); *Cooper v. State Farm*  
3 *Fire & Cas. Co.*, 568 So.2d 687, 696 (Miss.1990) (“Rule 37(c) clearly contemplates a motion  
4 after trial, and indeed a motion for sanctions prior to that time would be premature, since the  
5 party must have proved the genuineness of the document or the truth of the matter involved  
6 before he can move for sanctions.”); *A & V Fishing, Inc. v. Home Ins. Co.*, 145 F.R.D. 285, 288  
7 (D.Mass.1993) (noting that remedy provided by Rule 37(c) “is to be invoked only after the  
8 requesting party has made its proof” and that the advisory committee notes “make that point  
9 explicit”).

10 The court also notes that both parties have filed Motions for Summary Judgment on  
11 June 30, 2021. (HPT’s Motion ECF No. 119, Cannata’s Motion ECF No. 124). The factual  
12 allegations behind HPT’s Federal Rule 37(c)(2) Motion for Sanctions overlap with the  
13 undisputed material facts asserted in HPT’s Motion for Summary Judgment. In its Motion for  
14 Summary Judgment, HPT stated that Cannata admitted to (1) sharing HPT’s confidential and  
15 proprietary trade secret information to third parties both while he was an owner of HPT and after  
16 signing a membership purchase agreement (“MIPA”) with HPT, and (2) retaining confidential  
17 and proprietary intellectual HPT property after the execution of the MIPA. (ECF No. 119, 2-3).

18 In its Motion for Sanctions, HPT asserted that Cannata lied about these facts in his  
19 Request for Admissions. (ECF No. 117, 10-11). But because no court has ruled on these factual  
20 issues yet, it appears that HPT has not “made its proof” required in a Federal Rule 37(c)(2)  
21 Motion for Sanctions. This further suggests that HPT’s Federal Rule 37(c)(2) Motion for  
22 Sanctions is premature and might be more appropriately filed after trial or after resolution of the  
23 Motions for Summary Judgment in HPT’s favor. See *Chemical Eng'g Corp. v. Essef Indus.*,

1 *Inc.*, 795 F.2d 1565, 1574–75 (Fed.Cir.1986) (holding that summary judgment can serve as the  
2 basis of a successful Federal Rule 37(c) motion.)

3 In HPT’s Motion for Sanctions (ECF No. 110), Cannata’s Response (ECF No. 115), and  
4 HPT’s Reply (ECF No. 117), neither party briefed the “timing” issues discussed above.

5 Therefore, the court directs counsel to submit simultaneous briefing (not to exceed six pages)

6 **by July 15, 2021 at the close of business** on the narrow issue of whether HPT’s Fed. R. Civ. P.

7 37(c)(2) Motion for Sanctions is premature.<sup>1</sup>

8 **IT IS SO ORDERED.**

9 Dated: July 9, 2021.

10 

11 

---

William G. Cobb  
United States Magistrate Judge

12  
13  
14  
15  
16  
17  
18  
19  
20 

---

<sup>1</sup> Without making a final ruling, the court also notes that HPT’s Motion for Sanctions is partially  
21 based upon Fed. R. Civ. P. 11 and 28 U.S.C. §1927, which are sanctions only applicable to  
22 attorneys. The court is reluctant to impose sanctions on Cannata’s counsel when HPT addressed  
23 its Motion for Sanctions to Cannata only. (See ECF No. 110 at p. 1: “Motion for Sanctions []  
against Defendant KENNETH CANNATA” and p. 18: “[ ] Imposition of Sanctions against  
Defendant, KENNETH CANNATA, as Follows [ ]”). In addition, without deciding that issue at  
this time, there appears to be insufficient evidence of sanctionable conduct attributed to  
Cannata’s counsel.